J RAJU M KERPAYA A

v.

KWONG YIK BANK BHD

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
JEFFREY TAN JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: P-03-247-2008]
6 SEPTEMBER 2011 C

BANKRUPTCY: *Creditor's petition - Affidavit verifying petition - Failure to verify affidavit at time of presenting petition - Whether petition a nullity - Time for filing affidavit - Whether prior to hearing of petition - Bankruptcy Act 1967, ss. 5 & 6(1)* D

This was the appellant's appeal wherein he contended that the creditor's petition issued by the respondent against him was a nullity since there was no affidavit verifying the petition as required under s. 6(1) of the Bankruptcy Act 1967 ('the Act') at the time of presenting the said petition. Nevertheless, the respondent had filed a verification affidavit some 45 days later after the said creditor's petition was presented. The adjudication and receiving orders were then granted by the Senior Assistant Registrar and affirmed by the learned High Court judge. Dissatisfied with the decision of the High Court, the appellant appealed to this court. E F

Held (dismissing the appeal; affirming decision of the High Court)
Per Syed Ahmad Helmy JCA delivering the judgment of the court: G

(1) It is evident from the express wording of s. 5 of the Act that there is no requirement for a verification affidavit as a condition for the presentation of a creditor's petition. Furthermore, unlike a winding up petition, s. 6(1) of the Act though prescribes that the creditor's petition to be verified by affidavit does not stipulate at what point of time it needs to be filed. As such, there is no statutory requirement that the creditor's petition must be accompanied by a verification affidavit at the time of its filing and/or issuance. (para 13) H I

(1a) The wording of s. 6(1) of the Act merely requires that the petitioning creditor file in the affidavit verifying the creditor's petition at any time prior to the hearing. (para 13)

(2) The rationale behind the necessity of filing a verification affidavit is to enable the court to make the appropriate orders on the creditor's petition at the hearing thereof. If no verification affidavit was placed before the court on the hearing of the creditor's petition, then, invariably the merits are not proved to the satisfaction of the court and would accordingly be dismissed. (para 13)

(3) The case of *Re Arul Das Michale, Ex P Malayan Banking Bhd* was influenced more by the winding-up principles which specifically provides for a verifying affidavit to be filed within four days after the presentation of the winding-up petition. Bankruptcy matters are regulated by statutory and regulatory provisions which are different from winding up proceedings. Hence, the courts must apply statutory and regulatory provisions regulating bankruptcy proceedings in bankruptcy matters. (para 15)

(4) The verifying affidavit herein, though filed 45 days after the creditor's petition, was before the court at the hearing date and the court, being satisfied with the proof of petition, had adjudicated on the same by granting the adjudication and receiving orders. There was no error on the part of the court below for appellate interference. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu di mana beliau telah berhujah bahawa petisyen pemiutang yang dikeluarkan oleh responden terhadapnya adalah terbatal kerana tiada afidavit penentusahan seperti yang diperuntukkan di bawah s. 6(1) Akta Bankrapsi 1967 ('Akta') pada masa pengemukaan petisyen tersebut. Walau bagaimanapun, responden telah memfailkan satu afidavit penentusahan 45 hari selepas pengemukaan petisyen pemiutang. Perintah penghukuman dan perintah penerimaan telah dibenarkan oleh Penolong Kanan Pendaftar dan telah disahkan oleh yang arif hakim Mahkamah Tinggi. Tidak puas hati dengan keputusan Mahkamah Tinggi, perayu telah merayu kepada mahkamah ini.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Adalah terbukti daripada perbahasaan nyata s. 5 Akta bahawa tiada keperluan bagi afidavit penentusahan sebagai syarat untuk mengemukakan petisyen pemiutang. Selain itu, berlainan daripada petisyen penggulungan, s. 6(1) Akta walaupun menyatakan bahawa petisyen pemiutang perlu disahkan oleh afidavit, tidak memperuntukkan pada bila masanya ia perlu difailkan. Oleh itu, tiada keperluan statutori bahawa petisyen pemiutang mesti diiringi bersama-sama dengan afidavit penentusahan pada masa pemfailan dan/atau pengeluarannya.

(1a) Perbahasaan s. 6(1) Akta hanya memerlukan supaya pemiutang memfailkan afidavit penentusahan petisyen pemiutang pada bila-bila masa sebelum pendengaran.

(2) Rasional di belakang kehendak memfailkan afidavit penentusahan adalah untuk membolehkan mahkamah membuat perintah-perintah yang berpatutan terhadap petisyen pemiutang pada masa pendengaran. Jika tiada afidavit penentusahan di hadapan mahkamah semasa pendengaran petisyen pemiutang, maka, biasanya merit-merit tidak dapat dibuktikan kepada kepuasan mahkamah dan akan ditolak.

(3) Kes *Re Arul Das Michale, ex p Malayan Banking Bhd* telah dipengaruhi lebih dengan prinsip-prinsip penggulungan yang dengan khususnya memperuntukan supaya suatu afidavit penentusahan difailkan dalam masa empat hari selepas pengemukaan petisyen penggulungan. Perkara bankrapsi dikawal oleh peruntukan statutori dan peraturan yang berbeza daripada prosiding-prosiding penggulungan. Oleh itu, mahkamah perlu memakai peruntukan-peruntukan statutori dan peraturan yang mengawal prosiding-prosiding bankrapsi dalam perkara bankrapsi.

(4) Afidavit penentusahan di sini, walau pun difailkan 45 hari selepas petisyen pemiutang, adalah di hadapan mahkamah pada tarikh pendengaran dan mahkamah, berpuas hati

dengan bukti petisyen, telah menghakimi dan membenarkan perintah penghukuman dan perintah penerimaan. Tiada sebarang kesilapan dari mahkamah di bawah untuk campurtangan rayuan.

Case(s) referred to:
Ghazali Mat Noor v. Southern Bank Bhd & Other Cases [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 SC ***(refd)***
Re Arul Das Michale, ex p Malayan Banking Bhd [2001] 5 CLJ 32 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 5(i), 6(1)
Bankruptcy Rules 1969, rr. 18, 95

For the appellant - Geetar Kaur; M/s Karupiah & Co
For the respondent - Leong Wai Hong (Ng Chian Huey with him); M/s Skrine & Co

[Appeal from High Court, Pulau Pinang; Bankruptcy No: 29-440-1991]

Reported by Kumitha Abdul Majid

JUDGMENT

Syed Ahmad Helmy JCA:

[1] The appeal herein is the continuing saga of the altercation between the parties in respect of bankruptcy proceedings initiated by the respondent bank on 30 April 1991 in the Pulau Pinang High Court and registered as Bankruptcy No. 29-440-1991 pursuant to a summary judgment obtained on 15 October 1987 against the appellant for the sum of RM1,337,287.01.

[2] The filing of the bankruptcy notice on 30 April 1991 was strenuously resisted by the appellant as evident by the two applications taken out by the appellant. The first application was made through the filing of an affidavit under r. 95 of the Bankruptcy Rules 1969 on 9 December 1991. Under the said r. 95 the filing of an affidavit operates as an application to set aside the bankruptcy notice. It is imperative to note that in embarking upon this mode of setting aside, it is incumbent upon the appellant to comply with the requirements as provided for by s. 3(1)(i) of the Bankruptcy Act (BA) in that he must within seven

days after service of the bankruptcy notice state in his affidavit that he has a counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt. The application went through three stages of hearing – before the Senior Assistant Registrar which rejected the application on 13 December 1993; on appeal to the judge, the application was allowed on 21 December 1995 but was reversed by the Court of Appeal on 8 February 1999 with the consequent result of the validity of the bankruptcy notice being intact.

[3] The second application by the appellant was made pursuant to r. 18 of the Bankruptcy Rules through the mechanism of a summons-in-chambers supported by an affidavit in support. Rule 18 regulates setting aside of a bankruptcy notice which requires the judgment debtor to pay a judgment debt otherwise than in accordance with terms of the judgment.

[4] The summons-in-chambers together with the supporting affidavit was filed by the appellant and the main ground upon which the application was founded was the excessive sum demanded in the bankruptcy notice occasioned by the failure to deduct the auction proceeds of RM823,200 derived from the sale of the auctioned property. Though the bankruptcy notice was struck out by the Senior Assistant Registrar nevertheless on appeal it was reinstated by the High Court Judge who accordingly amended the bankruptcy notice to reflect the deduction of the auction proceeds which reinstatement was affirmed by the Court of Appeal.

[5] The respondent bank based on the valid bankruptcy notice proceeded with the filing of the creditor's petition dated 23 March 1992 on 21 April 1992. A verifying affidavit of truth of the statement in the petition was filed on 3 June 1992. Adjudication and receiving orders were granted by the Senior Assistant Registrar on 22 October 2008 and affirmed by the learned High Court Judge on 14 November 2008.

[6] Against the background aforesaid the appellant pursued his appeal before us and upon hearing the same, we accordingly dismissed the appeal and affirmed the adjudication and receiving orders made by the court below.

[7] The principal ground of challenge mounted by the appellant in this appeal is the failure of the respondent bank to verify by affidavit the creditor's petition that was presented on 21 April 1992. By reason thereof the appellant took the position that the creditors petition so presented was a nullity due to the non-verification of same by an affidavit as required by s. 6(1) of the Bankruptcy Act 1967.

[8] In advancing his argument that the verifying affidavit is a mandatory condition precedent to the issuance of the creditors petition learned counsel for appellant referred us to two cases – *Re: Arul Das a/l Michale, ex p Malayan Banking Berhad* [2001] 5 CLJ 32 and *Ghazali Mat Noor v. Southern Bank Bhd & Other Cases* [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35.

[9] In addressing the challenge mounted, the point to note is that though there was no verification affidavit at the time the creditor's petition was presented on 21 April 1992, nevertheless a verification affidavit was filed some 45 days later ie, on 5 June 1992.

[10] The appellant's challenge as to the creditor's petition being a nullity owing to the non-verification of the same by an affidavit as required by s. 6(1) of the Bankruptcy Act 1967 requires an examination of the relevant provisions of the Bankruptcy Act and Rules pertaining to creditor's petition.

[11] The conditions upon which a creditor is entitled to present a creditor's petition is regulated by s. 5(i) of the Bankruptcy Act 1967 which provides for four conditions that must be present namely:

> **5. Condition on which creditor may petition**
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless -
>
> (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit; and
>
> (b) the debt is a liquidated sum payable either immediately or at some certain future time; and

(c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and

(d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

Upon the conditions being fulfilled the proceedings are regulated by s. 6 which prescribes as follows:

6. Proceedings and order on creditor's petition

(1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.

(2) At the hearing the court shall require proof of -

(a) the debt of the petitioning creditor; and

(b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, someone of the alleged acts of bankruptcy; and

(c) if the debtor does not appear, the service of the petition,

and if satisfied with the proof may make a receiving order in pursuance of the petition.

(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

(4) when the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security, if any, being given as the court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(6) Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(7) A creditor's petition shall not after presentation be withdrawn without the leave of the court.

[12] It is evident from the express wording of s. 5 that there is no requirement for a verification affidavit as a condition for the presentation of a creditor's petition.

[13] It is also pertinent to note that unlike a winding-up petition s. 6(1) though prescribing the creditor's petition to be verified by affidavit nevertheless does not stipulate at what point of time it needs to be filed. That being the case we are of the considered view that there is no statutory requirement that the creditor's petition must be accompanied by an verification affidavit at the time of its filing and/or issuance. The High Court in *Re Arul Das a/l Michale, ex p Malayan Banking Berhad* [2001] 5 CLJ 32 to our mind fell in error by holding that s. 6(1) makes the affidavit verifying the petition a condition precedent and is tantamount to reading into the section an requirement which does not exist. The rationale behind the necessity of filing a verification affidavit is to enable the court to make the appropriate orders on the creditor's petition at the hearing thereof. If no verification affidavit was placed before the court on the hearing of the creditor's petition then invariably the merits are not proved to the satisfaction of the court and would accordingly be dismissed. The wordings of s. 6(1) of the Act in our view merely requires the petitioning creditor to file in the affidavit verifying the creditor's petition at any time prior to the hearing of the petition.

[14] Adverting to the reference to the case of *Ghazali bin Mat Noor (supra)* it is of no assistance to the appellant in the determination of the issue at hand as the ratio relates to the invalidity of a bankruptcy notice for non-quantification of the exact amount due as at the date of the bankruptcy notice.

[15] As regards *Re Arul Das (supra)* the decision was influenced more by winding-up principles which specifically provides for a verifying affidavit to be filed within four days after the presentation of the winding-up petition. The express time period stipulation make its compliance mandatory. Bankruptcy matters are regulated by statutory and regulatory provisions which are different from statutory and regulatory provisions in winding-up proceedings. The courts must apply statutory and regulatory provisions regulating bankruptcy proceedings in bankruptcy matters. The verifying affidavit herein though filed 45 days after the creditor's petition was before the court at the hearing date and the court being satisfied with proof of the petition adjudicated on same by granting the adjudication and receiving orders. There is no error on the part of the court below for appellate interference.

[16] We accordingly dismiss the appeal and affirm the decision of the learned High Court Judge.